In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-903

VINCENZO CONSIGLIO, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

No. 73-5730

JOSEPH PATRICK DiPIETRO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioners contend that the government failed to comply with the authorization, need, and notice requirements of the wire interception provisions in Title III of the Omnibus Crime Control and Safe Streets Act of 1968 (18 U.S.C. 2510-2520) and that the statute is unconstitutional.

After a plea of nolo contendere in the United States District Court for the District of Connecticut, prior to which petitioners reserved for appellate review the issues herein presented,[1] petitioners were convicted of being engaged in a bookmaking operation and transmitting betting information by interstate telephone calls, in violation of 18 U.S.C. 1084 and 18 U.S.C. 1952, and of conspiracy to commit these offenses in violation of 18 U.S.C. 371. Petitioners were sentenced to varying terms of imprisonment and/or fines.[2] The district court filed an opinion denying motions to suppress the wire interception evidence, 342 F. Supp. 556 (D. Conn.) (Pet. App. 2a-11a),[3] and another unreported opinion denying motions to dismiss the indictments and suppress evidence

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[1]It is the present policy of the Department of Justice not to agree to such pleas with reservation of a right to raise non-jurisdictional issues on appeal. We do not challenge the procedure here, however, since this agreement was entered into by the government attorney with the acquiescence of the trial court, and such agreements are recognized in the Second Circuit. See *United States* v. *Doyle*, 348 F. 2d 715, 717 (C.A. 2), certiorari denied, 382 U.S. 843; *United States* v. *Mann*, 451 F. 2d 346, 347 (C.A. 2). As a matter of policy, the courts of appeals in the Fifth and Sixth Circuits do not permit the preservation by agreement of appeals on non-jurisdictional grounds after pleas of guilty or nolo contendere. *United States* v. *Mizell*, 488 F. 2d 97 (C.A. 5), *United States* v. *Cox*, 464 F. 2d 937 (C.A. 6).

[2]Petitioner Consiglio was sentenced to one year's imprisonment and fined $2,500. Petitioner Zimmerman was sentenced to one year's imprisonment and fined $5,000. Petitioner Laudano was fined $750. Petitioner Campagnuolo was sentenced to eighteen months' imprisonment and fined $3,000. Petitioner DeNegris was sentenced to one year's imprisonment, with the sentence suspended; he was placed on probation for five years and fined $3,000. Petitioner DiPietro was sentenced to two years' imprisonment; the sentence was suspended, and he was placed on five years' probation and fined $1,500.

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[3]"Pet. App." refers to the Appendix in No. 73-903.

(Pet. App. 11a-23a). The Court of appeals affirmed *per curiam* on October 12, 1973 (Pet. App. 1a).[4]

The facts relating to the wire interception authorizations are set forth in the first opinion of the district court (Pet. App. 2a-5a). Briefly, the conviction in this case was based on evidence obtained from two wire interceptions authorized by federal district judges in Miami, Florida, and Hartford, Connecticut, pursuant to Title III of the Omnibus Crime Control and Safe Streets Act of 1968. The applications had been personally authorized for submission to the court by former Attorney General Mitchell, who sent memoranda to that effect to former Assistant Attorney General Wilson. Letters notifying the government attorneys who had requested the authorizations were sent from the office of the Assistant Attorney General. Assistant Attorney General Wilson's signature was affixed to the letter by former Deputy Assistant Attorney General Petersen, pursuant to procedures prescribed by Mr. Wilson.

The Florida wire interception terminated on February 26, 1970. On May 19, 1970, the district judge ordered that an inventory be served by the marshal upon petitioners Campagnuolo and DiPietro pursuant to 18 U.S.C. 2518(8)(d). The inventory was served on petitioner Campagnuolo on July 1, 1970, and on petitioner DiPietro on July 15, 1970 (Pet. App. 14a). No inventory notice was served on the other petitioners, none of whom had been named in the order authorizing the wire interception.

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[4]The petition for a writ of certiorari in No. 73-903 was filed on December 8, 1973, and is substantially out of time under Rule 22(2) of the Rules of this Court.

1. Petitioners contend that Title III is unconstitutional because it allegedly authorizes general warrants which do not describe with particularity the evidence to be seized, allows an excessive invasion of a citizen's zone of privacy, and authorizes secret searches by not requiring prompt notice, all in violation of the Fourth Amendment, and permits the seizure of testimonial evidence in violation of the Fifth Amendment. Similar attacks have been uniformly rejected by every court of appeals which has passed on the constitutionality of the statute. See *United States* v. *Tortorello,* 480 F. 2d 764 (C.A. 2), certiorari denied, 414 U.S. 866; *United States* v. *Bobo,* 477 F. 2d 974 (C.A. 4), petition for certiorari pending, No. 73-231; *United States* v. *Whitaker,* 474 F. 2d 1246 (C.A. 3), certiorari denied, 412 U.S. 953; *United States* v. *Cox,* 462 F. 2d 1293 (C.A. 8), petition for certiorari pending, No. 72-5278; *United States* v. *Cox,* 449 F. 2d 679 (C.A. 10), certiorari denied, 406 U.S. 934[5]. The court of appeals here correctly characterized petitioners' constitutional objections as "without merit" (Pet. App. 1a).

2. Petitioners also contend that the applications did not show that normal investigative procedures reasonably appeared unlikely to succeed. This contention was also correctly rejected below. In the Florida affidavit, the FBI agent-affiant explained that the interception was necessary because bettors would not cooperate with law enforcement officers investigating gambling activities; because informants who had provided information in the case had stated that they would refuse to testify and that compelling them to testify would expose them to retaliation; because telephone records are not sufficient to

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[5]*Hoffa* v. *United States,* 385 U.S. 293, rejects the contention that the use of an individual's overheard conversations against him violates the Fifth Amendment.

prove the gambling operations; and because standard investigative procedures such as physical surveillance and examination of gambling records promised little probability of success (Affidavit of John J. Cloherty, Jr., February 18, 1970, pp. 10-11, paragraph 6). The agent-affiant made similar averments in the Connecticut affidavit (Affidavit of Richard D. Ludwig, April 7, 1970, pp. 10-11, paragraph 24). The findings of the two district judges, pursuant to Section 2518(3)(c), that the interceptions were necessary because normal investigative procedures reasonably appeared unlikely to succeed, are thus adequately supported by the record.[6]

Petitioners' further contentions that intrastate calls should not have been intercepted and that the evidence derived from the Florida wiretap should be suppressed because those named in the order did not receive the inventory until more than 90 days after the interception terminated (and petitioner Consiglio received no inventory of that interception) are similarly unmeritorious. The former contention is refuted by the fact that an interstate gambling operation would certainly involve intrastate telephone transactions; the latter was discussed and rejected by the district court in its second opinion (Pet. App. 14a-17a), upon which we rely.

3. Petitioners further claim that the authorization procedure within the Department of Justice was improper under the statute and that the proof of the authorization was inadequate. They contend (1) that the government failed to comply with the authorization requirements of Section 2516(1), in that the Attorney General did not properly review and authorized the wire interception ap-

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[6]The district court explicitly so found with respect to the Connecticut order (Pet. App. 20a-21a).

plication; (2) that the affidavits which disclosed the personal authorization by the Attorney General were inadmissible because they constituted hearsay, purported to establish the authority of the affiants to act as agents solely through their own assertions, stated conclusions of law, and purported to set forth facts known to the affiants without establishing a proper foundation; and (3) that the record does not show that the issuing judge in the Southern District of Florida was shown the memo from Mr. Mitchell to Mr. Wilson when the interception order was requested. The latter two contentions were fully discussed and correctly rejected by the district court in its first opinion (Pet. App. 7a-11a), upon which we rely.

Since the issue of the validity of the application authorization procedures followed by the Department of Justice in the instant case is currently pending before this Court in *United States* v. *Chavez*, No. 72-1319, certiorari granted, 412 U.S. 905, argued January 8, 1974, it would be appropriate for the Court to defer disposition of these petitions pending its decision in *Chavez*.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

APRIL 1974.